

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----  
**ALLSTATE INSURANCE COMPANY, ET AL.**  
Plaintiff(s),

**ORDER TO SHOW CAUSE**

Civil Case No.: 11cv6360  
FB/VVP

- against -

**BENJAMIN YENTEL, M.D., ET AL.**  
Defendant(s).  
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Upon reading and filing the declaration of Frank D'Esposito, Esq. On behalf of non-party Jamaica Wellness Medical, P.C., dated October 18, 2012, the exhibit annexed thereto and the accompanying Memorandum of Law in support, and upon the papers and proceedings had heretofore had herein,

Let Plaintiff Allstate Insurance Company show cause before the Hon. \_\_\_\_\_ by filing and service upon all parties to this action of papers in opposition on or before \_\_\_\_\_ via Electronic Case Filing system, and papers in response to said opposition, if any, filed and served on or before \_\_\_\_\_ via Electronic Case Filing System, and upon appearance before the Court of the parties if so directed by the Court thereafter, why an Order should not be entered pursuant to Fed. R. Civ. P. Rule 45 quashing a subpoena dated August 28, 2012, with a compliance date of October 19, 2012, issued by Plaintiff directed to Jamaica Wellness Medical, P.C.; and sufficient cause therefore, it is

ORDERED, that pending hearing and determination of this motion, said subpoena is stayed from enforcement and Jamaica Wellness Medical, P.C., not be required to appear or produce and permit inspection as commanded by the subpoena; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is granted upon the parties to this action via Electronic Case Filing by the Court, on or before \_\_\_\_\_ be good and sufficient service.

Dated: October 18, 2012

ENTER,

\_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----  
**ALLSTATE INSURANCE COMPANY, ET AL.**  
Plaintiff(s),

**DECLARATION**

Civil Case No.: 11cv6360  
FB/VVP

- against -

**BENJAMIN YENTEL, M.D., ET AL.**  
Defendant(s).  
-----

Frank D'Esposito, an attorney duly admitted to practice in the courts of the State of New York, including the United States District Court for the Eastern District of New York, under the penalties of perjury declares:

1. I am counsel for non-party Jamaica Wellness Medical, P.C..
2. I make this declaration from a review of the records and files of this action kept in the ordinary course of business.
3. I make this declaration on behalf of and in support of non-party Jamaica Wellness Medical P.C.'s motion brought by Order to Show Cause pursuant to Fed. R. Civ. P. Rule 45 for an order quashing the subpoena dated August 28, 2012, with a compliance date of October 19, 2012, issued by Plaintiff Allstate Insurance Company directed to Jamaica Wellness Medical, P.C. A copy of the Subpoena is attached hereto as Exhibit A.
4. Non-Party Jamaica Wellness Medical, P.C.'s motion is brought by Order to Show Cause because the date of compliance is imminent and irreparable harm may occur otherwise through impermissible and unprotected disclosures.
5. As fully set forth in the accompanying Memorandum of Law, the subpoena must be quashed as the Plaintiff failed to tender the proper fee for a non-party's appearance at a deposition.

WHEREFORE, it is respectfully requested the Court grant non-party Jamaica Wellness Medical, P.C.'s motion for an order quashing the deposition subpoena served by Plaintiff, plus further relief as the Court deems appropriate, including costs and attorney's fees associated with this motion.

Dated: Brooklyn, New York

October 18, 2012

A handwritten signature in dark ink, appearing to read "Frank D'Esposito", is written over a horizontal line.

Frank D'Esposito  
Law Office of Melissa Betancourt, P.C.  
155 Kings Highway, 3<sup>rd</sup> Floor  
Brooklyn, NY 11223

## **EXHIBIT “A”**

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

## UNITED STATES DISTRICT COURT

for the

Eastern District of New York

Allstate Insurance Company, et al.

Plaintiff

v.

Benjamin Yentel, M.D., et al.

Defendant

Civil Action No. 11 CV 6360

(If the action is pending in another district, state where:)

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Jamaica Wellness Medical, P.C., 455 Ocean Pkwy, Suite 1EFG, Brooklyn, New York 11218

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

The relationship between Jamaica Wellness Medical, P.C. ("Jamaica") and Benjamin Yentel, M.D. ("Yentel"), B.J.Y. Freeport, P.C. ("BJY"), B.Y., M.D., P.C. ("BYMD") and Innovative Medical, P.C. ("Innovative").

Place: Bruno, Gerbino & Soriano, LLP  
445 Broad Hollow Road, Suite 220  
Melville, New York 11747

Date and Time:

10/19/2012 10:00 am

The deposition will be recorded by this method: Court Reporter

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Any and all agreements, contracts and documents between Jamaica and Benjamin Yentel, M.D. ("Yentel"), B.J.Y. Freeport, P.C. ("BJY"), B.Y., M.D., P.C. ("BYMD") and Innovative Medical, P.C. ("Innovative"). Including but not limited to any transfer of ownership documents, management agreement, lease agreements or any other agreements entered into between the above-mentioned parties or transferred from any of the above-mentioned parties to Jamaica and/or any officers, agents or owners of Jamaica.

The provisions of Fed. R. Civ. P. 45(e), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 08/28/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party)

Allstate Insurance Company, et al., who issues or requests this subpoena, are:  
Vincent F. Gerbino, Esq., Bruno Gerbino & Soriano LLP, 445 Broad Hollow Road, Suite 220, Melville, New York 11747  
VGerbino@bgsllaw-ny.com, (631) 390-0010

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----  
**ALLSTATE INSURANCE COMPANY, ET AL.**

Plaintiff(s),

**MEMORANDUM OF LAW**

Civil Case No.: 11cv6360  
FB/VVP

- against -

**BENJAMIN YENTEL, M.D., ET AL.**

Defendant(s).

-----  
**MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY JAMAICA WELLNESS  
MEDICAL, P.C.'S MOTION TO QUASH PLAINTIFF'S SUBPOENA**

Submitted by:  
FRANK D'ESPOSITO  
Law Office of Melissa Betancourt, P.C.  
Attorney for Jamaica Wellness Medical, P.C.  
155 Kings Highway, 3<sup>rd</sup> Floor  
Brooklyn, NY 11223  
PHONE: (718) 336-8076  
FAX: (718) 837-2684

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PRELIMINARY STATEMENT

Jamaica Wellness Medical, P.C., (hereinafter “Jamaica Wellness”) a non-party to the subject action, submits this memorandum of law in support of the instant motion pursuant to Fed. R. Civ. P. Rule 45 for an Order of this Court quashing a subpoena dated August 28, 2012, issued by Plaintiff, Allstate Insurance Company, and to stay enforcement and compliance of said subpoena until such time as this motion is decided.

This motion is brought by Order to Show Cause because the date of compliance is imminent, which does not allow for the usual briefing schedule on a motion and irreparable harm may occur otherwise through impermissible disclosures.

PERTINENT FACTS

Jamaica Wellness, a non-party medical provider, was served with a deposition subpoena by Plaintiff’s law firm, Bruno, Gerbino & Soriano, LLP. Such subpoena is dated August 28, 2012, and commands the appearance of a representative of Jamaica Wellness to testify as to the relationship between Jamaica Wellness and Benjamin Yentel, M.D., B.J.Y. Freeport, P.C., B.Y., M.D., and Innovative Medical, P.C. Moreover, Plaintiff’s subpoena demands that Jamaica Wellness travel from Brooklyn, New York to Melville, New York (the location of Plaintiff’s law firm’s office) on October 19, 2012. Lastly, in addition to Jamaica Wellness’ appearance at the aforesaid deposition, plaintiff demands that Jamaica Wellness bring various corporate documents to such deposition.

LEGAL ARGUMENT

Under Rule 45 of the Federal Rules of Civil Procedure, “service of a subpoena upon a person named therein shall be made by delivering a copy and, if the person’s attendance is commanded, by tendering to that person the fees for one day’s attendance and the mileage allowed by law.” Fed. R. Civ. P. 45(b)(1). Moreover, the plain meaning of Rule 45 (b)(1) requires “simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena.” *CF&I Steel Corp. v. Mitsui & Co.*, 713 F.2d 494, 496 (9<sup>th</sup> Cir. 1983). Furthermore, a deposition witness is entitled to a statutory fee of forty dollars and reasonable mileage allowance. *In re Dennis*, 330 F.3d 696, 703 (5<sup>th</sup>

Cir. 2003).

*In Re Dennis, supra*, in upholding the bankruptcy court's decision to quash a deposition subpoena, the United States Court of Appeals held:

The subpoena was not properly served. A deposition witness is entitled to a statutory fee of forty dollars and reasonable mileage allowance based on his mode and transportation. 28 U.S.C. § 1821(b)-(c). Robertson tendered the forty-dollar fee with the subpoena but did not tender the mileage allowance. *Id.*

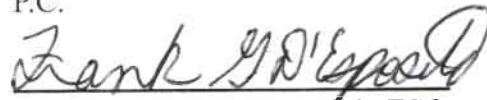
Concerning the subpoena herein, Jamaica Wellness was not properly served. Upon serving Jamaica Wellness with the deposition subpoena in question, Plaintiff only tendered fifteen dollars, not forty dollars as is required. Moreover, Plaintiff failed to tender any payment to Jamaica Wellness for reasonable mileage allowance. As such, the service of Plaintiff's subpoena is in clear violation of Rule 45 of the Federal Rules of Civil Procedure, as well as applicable case law. Accordingly, the subpoena must be quashed.

#### CONCLUSION

For the aforementioned reasons, the subpoena issued by Plaintiff should be stayed until such time as this motion is decided and the Court should grant an Order quashing the subpoena.

Dated: October 17, 2012  
BROOKLYN, NEW YORK

LAW OFFICE OF MELISSA BETANCOURT,  
P.C.



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